No. 85-82

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BUILDING AND CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA AND VICINITY, *et al.*,
Petitioners,

v.

ALTEMOSE CONSTRUCTION COMPANY AND CHAMBER OF COMMERCE OF THE UNITED STATES,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM OF RESPONDENT, CHAMBER OF COMMERCE OF THE UNITED STATES, IN PARTIAL SUPPORT AND PARTIAL OPPOSITION

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LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS FOR THE THIRD CIRCUIT

In addition to the parties listed on pages ii and iii of the Petition, the Associated Builders and Contractors, Inc., a co-plaintiff in the district court, withdrew its appeal prior to the decision of the Court of Appeals for the Third Circuit.

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Petitioners,

v.

ALTEMOSE CONSTRUCTION COMPANY AND CHAMBER OF COMMERCE OF THE UNITED STATES,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

MEMORANDUM OF RESPONDENT CHAMBER OF COMMERCE OF THE UNITED STATES IN PARTIAL SUPPORT AND PARTIAL OPPOSITION

Respondent, Chamber of Commerce of the United States ("the Chamber") requests that this Court deny the petition as to questions 2 and 3, and suggests that the Court may wish to grant the writ to review question presented number 1.

JURISDICTION

Except that the decision of the Court of Appeals was rendered on January 8, 1985, petitioners' jurisdictional statement is not disputed.

STATUTES AND RULES INVOLVED

In addition to the references made on page 2 of the Petition, this case also invokes a request for declaratory relief pursuant to 28 U.S.C §§ 2201-02 (1982), treble damages pursuant to 15 U.S.C. § 15 (1982), and injunctive relief pursuant to 15 U.S.C. § 26.

STATEMENT OF THE CASE

The parties in this case include the Chamber[1] which filed this complaint on behalf of its affected construction user and contractor members in the Philadelphia area, Altemose Construction Company, an open shop construction company working in the Philadelphia area, and the Building and Construction Trades

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1. The Chamber is a federation consisting of over 2700 state and local trade associations and chambers of commerce and has a direct membership of more than 250,000 business activities. It is the largest association of business and professional organizations in the United States.

The Council on Labor Law Equality is a national association of large and small employers, formed to monitor and support labor questions that affect a broad section of industry in order to maintain a balanced approach to the interpretation of national labor policy.

Council (BCTC), an association of 56 labor organizations and trade unions. The Associated Builders and Constructors, Inc. (ABC) initially joined the complaint in this matter, but is no longer involved in the case. The matter arises from the response of the Chamber and Altemose to the efforts of the BCTC to exclude non-Union contractors from the construction industry in the Philadelphia area during the 1970's.

In 1971, the BCTC requested that Altemose sign a "standard sub-contractors" agreement, in order to insure that it would only contract with union subcontractors and hire only union labor to work in its company. (Ap. 6a-7a) The arrangement desired by the BCTC would have demanded that Altemose fire 150 employees, and replace them with all union members. When Altemose expressed its unwillingness to sign a union-only

subcontractors' agreement, members of the BCTC began a campaign of violence and intimidation in an attempt to convince Altemose to sign. The BCTC has insisted throughout this case that it was not trying to organize Altemose's employees or to settle a legitimate labor dispute between itself and Altemose.[2] (R. 506, 531-2, 633-4, 652-58, 659-661, 665.)*

Other non-union contractors in the Philadelphia area were subjected to the same treatment. Procida Construction

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2. The District Court found that subsequent picketing three years later at a different Altemose job site was for organizational or recognitional purposes. On appeal, the petitioners vigorously contested both the factual and legal relatedness of the subsequent picketing to the question of the initial organizational or recognitional intent of the pickets. This question has been remanded for trial. There is no question of organizational or recognitional picketing in the union conduct relating to chamber members other than Altemose. (A. 26a)

* Reference to the record are cited as (R.)

Company, a Chamber member and open-shop general contractor operating in the Philadelphia area, was similarly intimidated by the BCTC to sign its standard union-only subcontracting agreement. In 1976, Procida contracted to build a Roy Rogers restaurant in Delaware County, Pennsylvania. Procida contacted numerous union and non-union subcontractors to obtain bids for completing electrical, plumbing and excavating work, and found that the non-union contractors offered bids 30% to 40% below those of the union contractors. (R. 1039-50) Upset that Procida subcontracted with non-union contractors, the BCTC began picketing the Procida job site

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3. Nine separate electrical subcontractors were contacted in an effort to obtain the lowest bid. (R. 1037-38)

on May 20, 1976. The BCTC refused to remove its pickets unless Procida signed Form 3, one of the forms containing the restricting subcontracting agreements, and cancelled its contract with the non-union contractors. (R. 1081-90).[4] The violent nature of the picketing caused the construction work to come to a halt. After the BCTC agreed to provide union labor at the same price as that provided by the non-union contractors, Procida capitulated and agreed to sign a written agreement removing the non-union subcontractors and to contract for the services of the union contractors, but did not sign the long term Form 3. (R. 1094-6, 1102-05)

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4. The subcontractor's agreements sought by the defendants, all demanding the exclusive use of union subcontractors, are described in detail in the Altemose brief at p. 9, fn. 10.

During the summer of 1974, Worthington Construction Company, another Chamber member and open-shop contractor, was forced to discontinue work on an addition to a 3-M facility in Bristol, Pennsylvania. BCTC members picketed the worksite at 3-M, also a Chamber member, and vowed to do so until Worthington hired only union subcontractors. (R. 421-22). Because Worthington refused to dismiss its non-union subcontractors and replace them with union members, it eventually lost the 3-M contract, because 3-M employees honored the picket lines manned by the BCTC and Carpenters. (R. 420-21) The BCTC and the Carpenters continued to picket as long as Worthington used the services of non-union subcontractors, regardless of the rates which

Worthington and its non-union subcontractors were paying. (R. 421-21). Ultimately, 3-M hired three union contractors to replace Worthington, and incurred larger fees than those charged by Worthington. (R. 487-89).

While working on a Presbyterian Church project in Pennsylvania and a project for Container Corporation of America, a Chamber member in Oaks, Pennsylvania, Raymond Davis & Sons, Inc., another Chamber member and non-union general contractor, was picketed by BCTC member unions who insisted that it use only union contractors to help complete the projects. Davis was eventually forced to employ only union subcontractors, even though those subcon-

tractors performed substandard work at a higher cost. The picketers beat Davis' non-union employees, and set fire to the construction site in an effort to bring about the change to a union-only project. (R. 367-373)

E. Arol Fesmire, another Chamber member and open-shop contractor in Philadelphia, was similarly forced to replace the non-union contractors with union contractors, and to pay between $4,000 and $7,000 above his original bids to have the same work done by these union contractors. BCTC pickets and 50 union men blocked the ingress and egress at Fesmire's worksite, and refused to allow Fesmire to continue his work until he had released his non-union subcontractors and hired union members to replace them. (R. 358-9)

Each of these situations involved an instance where the BCTC attempted to coerce an open-shop contractor into doing business exclusively with union subcontractors. The BCTC was not involved in a collective bargaining relationship with any of the non-union contractors mentioned, nor was it attempting to organize the non-union employees working for the open shop contractors. The district court found no dispute as to these facts other than the question of the intent of the picketers at the Altemose job site as discussed above. Thus, these findings were not disturbed by the appellate court.

In response to the actions of the BCTC, the Chamber, Altemose, and ABC filed a two count complaint against the BCTC for damages and declaratory and

injunctive relief.[5] Count I alleged that the unions and unnamed co-conspiring union contractors engaged in combinations in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C.§§1, 2). Count II alleged that the unions, acting alone for the benefit of a favored group of union contractors, engaged in combinations in violation of the Sherman Act. The district court granted summary judgment for the defendants in both Count I and Count II, finding a failure of proof of conspiracy in Count I and that the statutory and non-statutory exemptions to the anti-trust laws protect the unions' conduct alleged in Count II, even if a conspiracy could be proved. (A. 66a-73a, 42a - 53a) The Chamber and Altemose appealed to the Third Circuit, which

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5. Only Altemose asked for damages.

reversed the trial court holding that there was sufficient evidence of a conspiracy to withstand the Union's motion for summary judgment as to Count I, and that as to Count II the exemptions did not apply and there were sufficient is ues of material fact to warrant trial.

The application of the statutory exemptions to Count II is an issue of major importance affecting Chamber members throughout the country. It is an issue never directly addressed by this Court and only arguably considered by the Court in Connell Construction Co. v. Plumbers Local 100, 421 U.S. 616 (1975). Because of the unsettled nature of an issue of this magnitude, the Chamber respectfully suggests that the Court may wish to consider whether combinations of unions working together to exclude non-union

contractors from a major construction market, all for the benefit of a favored non-labor group, union contractors, are entitled to the statutory exemptions from anti-trust liability, and thus accommodate its decisions in Connell and Meat Cutters Union v. Jewel Tea Co., 381 U.S. 676 (1965) with the interpretation of H.A. Artists & Assoc. v. Actors' Equity Ass'n, 451 U.S. 704, as presented by the petitioner.

REASONS WHY THE WRIT SHOULD BE DENIED AS TO QUESTIONS PRESENTED 2 AND 3.

The Chamber agrees with Altemose that the petition should be denied as to the Union's questions presented as numbers 2 and 3, and, therefore, adopts the arguvents of the Respondent Altemose as set forth in its Brief in Opposition, Sections I and II, (pp. 5 through 13).

The Chamber, an independent association plaintiff, further states as to question number 3, that its affected members were not parties in any NLRB proceeding against the Philadelphia building trades unions, and therefore any collateral estoppel claim would be invalid as to them.

REASONS WHY THE COURT MAY WISH TO GRANT THE WRIT AS TO QUESTION PRESENTED NO. 1[6]

1. The Application of Hutcheson to Combinations of Unions Acting Alone in Restraint of Trade is Unclear.

The Third Circuit's analysis of the application of statutory exemptions to

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6. The Union's Question No. 1 is more accurately presented as: Does the statutory exemption to the anti-trust laws preclude an anti-trust claim against unions acting amongst themselves for the benefit of a favored group of unionized contractors when they seek subcontractors agreements from general contractors with whom they have no collective bargaining relationships in order to keep non-union contractors out of the market.

the facts in Count II is consistent with this Court's holding in United States v. Hutcheson, 312 U.S. 219 (1941), that unilateral union activity having a labor objective is exempt "[s]o long as the union acts in its self-interest and does not combine with non-labor groups," (App. 11a). Hutcheson stands for the principle that in order to avail themselves of the statutory exemption, the intra-union combination, if in restraint of trade, must be in their self-interest and not in combination with non-labor groups. If either factor exists, that is, if the questioned combination is not in the union's self-interest or the union is in combination with a non-labor group, then the exemptions do not apply. This principle has been applied by the First Circuit in Allied International Inc. v.

International Longshoremen's Ass'n, 640 F.2d 1368, 1380 (1st Cir. 1980), aff'd on oth'r gr'nds, 456 U.S. 212 (1982),[7] the Soviet boycott case, wherein the First Circuit held the statutory exemption to be unavailable because the union's boycott was to further its political goal, conduct that is not within the national labor policy.

Indeed, this analysis is suggested by the plurality decision in Meat Cutters Union, Local 189 v. Jewel Tea, Inc., 381 U.S. 676, 689, 691-93 (1965) wherein this Court, finding the unions to be acting alone, nevertheless found an anti-competitive combination, but exempted them from liability because their goal

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7. The Supreme Court did not decide this issue as it was not raised on appeal.

was within the national labor policy to bargain for and protect work hours. The clear implication in Jewel Tea is that if the unions' goal was simply anti-competitive, that is, "an effort by the unions to protect one group of employers from competition from another," the conduct would not be within the unions' self-interest, and the exemption would not be available. Id. at 693.

2. Jewel Tea Focuses on the "Self Interest" Factor.

The theory underlying Count II arises directly from Jewel Tea. There, local unions representing Chicago area butchers agreed with a food retailers' trade association to limit the hours that store meat departments would be open. Confronted with a potential strike if it refused to accept the conditions, Jewel signed the agreement and sued to invali-

date it under the Sherman Act. The district court found no evidence of a union-employer conspiracy and applied the statutory exemption; but the Seventh Circuit reversed , holding a conspiracy in restraint of trade could be committed by unions acting alone. Jewel Tea Co. v. Associated Food Retailers, 331 F.2d 547 (7th Cir. 1964).

The Supreme Court plurality rejected the union's contention that the exemption was applicable whenever unions acted alone, but recognized a narrow exemption through principles of accommodation:

> [E]xemption for union-employer agreements is very much a matter of accommodating the coverage of the Sherman Act to the policy of the labor laws. Employers and unions are required to bargain about wages, hours and working conditions, and this fact weighs heavily in favor of antitrust exemption for agreements on these subjects. But neither party need bargain about other

> matters and either party commits an unfair labor practice if it conditions its bargaining upon discussions of a nonmandatory subject.

381 U.S. at 689. On this basis the Court concluded that the conduct was exempt from antitrust sanctions:

> [A]lthough the effect on competition is apparent and real ... the concern of union members (with regard to the marketing-hours restriction) is immediate and direct. Weighing the respective interests involved, we think the national labor policy expressed in the National Labor Relations Act places beyond the reach of the Sherman Act union-employer agreements on when, as well as how long, employees must work. An agreement on these subjects between the union and the employers in a bargaining unit is not illegal under the Sherman Act, nor is the union's unilateral demand for the same contract of other employers in the industry.

381 U.S. at 691.

The critical caveat to the Court's conclusion was predicated on the hypothetical situation in which a restraint

on the product market resulted from union conduct that was not justified by the vital interests of union members:

> In such event the limitation imposed by the unions might well be reduced to nothing but an effort by the unions to protect one group of employers from competition by another, which is conduct that is not exempt from the Sherman Act. Whether there would be a violation of §§1 and 2 would then depend on whether the element of a conspiracy in restraint of trade or an attmept to monopolize had been proved.

381 U.S. at 692-93 (footnote omitted).

The concept of union antitrust liability for conduct designed and intended to protect a benefited employer class builds on the principle of Allen Bradley Co. v. IBEW, Local 3, 325 U.S. 797 (1945). There, in a situation involving a non-union co-conspirator, the Court held that "Congress never intended that unions could, consistent with the Sherman Act, aid non-labor groups to

create business monopolies and control the marketing of goods and services." 325 U.S. at 808.

This conforms to the basis of the conclusion in Connell Construction Co. v. Plumbers Local 100, 421 U.S. 616 (1975), that the union could not enhance its legitimate organization goal by compelling a stranger to hire only union subs because such conduct would eliminate competition on a matter unrelated to wages and working conditions. The Connell Court reached this conclusion in a situation in which there was no allegation of, or attempt to prove, the existence of a conspiracy between the union and unionized subcontractors.[8] "It thus appears

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8. Justice Douglas' dissent was based on the absence of a union-employer conspiracy claim in the complaint. 421 U.S. at 638.

that the court has dispensed with the requirement of conspiracy for subjecting union activity to antitrust litigation, at least outside the bargaining relationship." Pacific Maritime Ass'n. v. Federal Maritime Comm'n, 543 F.2d 404, 405 (D.C. Cir. 1976), rev'd on oth'r gr'nds, 435 U.S. 40 (1978) (footnote omitted).

Thus, the test that has emerged from this Court's analysis of the statutory exemption in light of Taft-Harley and Norris-LaGuardia does not focus on whether a union conspired with an employer. Rather, the question turns on whether the union's conduct is in the self-interest of the labor organization in terms of wages, hours and working conditions, and within a collective bargaining relationship. The statutory

exemption does not apply unless the union's conduct bears "a reasonable relationship to a legitimate union interest." Allied Int'l Inc. v. Int'l Longshoremen's Ass'n., 640 F.2d 1368, 1380 (1st Cir. 1980), aff'd, 456 U.S. 212 (1982); See also Adams Ray & Rosenberg v. William Morris Agency, 411 F. Supp. 403, 410-11 (C.D. Cal. 1976).

3. Connell Also Focuses on "Legitimate Self Interest."

In Connell, Local 100 sought restrictive subcontracting agreements similar to the type sought by the unions in this case from persons with whom the union had no bargaining relationship. The Court found the absence of the bargaining relationship to be controlling. Similarly, the facts in this case describe a broad pattern of picketing, violence, enforcement of "fair lists" all

designed to secure the Connell type of restrictive secondary subcontracting clauses. The Third Circuit noted that this case differs somewhat from Connell, because here a subcontracting agreement was not actually signed.[9] (App. 13a)

We respectfully suggest that the focus and analysis in Connell was on the legitimacy of the union's objectives rather than Connell's coerced signature on the agreement. The critical analysis in Connell appears to be:

> The agreements with Connell and other general contractors indiscriminately excluded non-union subcontractors from a portion of the market, even if their competitive advantages were not derived from substandard wages and working conditions but rather from more efficient operating methods. Curtailment of competition based on

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9. Note that in the case of Procida, an affected Chamber member, an agreement was actually signed. Infra at p. 7.

> efficiency is neither a goal of federal labor policy nor a necessary effect of the elimination of competition among workers. Moreover, competition based on efficiency is a positive value that the antitrust laws strive to protect.

This analysis of the non-statutory exemption by Justice Powell recognizes that the lack of legitimate labor objective is synonymous to the requirement that the union act in "its self-interest" as established in Hutcheson. Justice Powell underscores this principle when he establishes that even when the union's goals are arguably legal, "the methods the union [chooses to reach these goals] are not immune from anti-trust sanctions. Connell, 421 U.S. at 625. Therefore, as the statutory exemption in Hutcheson is in the conjunctive, the absence of a legitimate labor objective would preclude the availability of the

exemption. In this case the appellate courts found the unions' effort to be anti-competitive and thus, not within the union's self-interest.

The Third Circuit in applying the statutory exemption to unilateral union conduct relied upon the similarity of the anti-competitive objectives of the union in Connell and in this case, and properly applied the requirement for a legitimate labor objective to the availability of the statutory exemption.

4. H.A. Artist Must be Read in Light of Hutcheson, Jewel Tea and Connell.

The unions, in contrast to this suggested analysis, ask this court to focus its decision on H.A. Artists and Associates v. Actors Equity Ass'n, 451 U.S. 704, from which they argue that the statutory exemption is unavailable only

when they enter into agreements with non-labor groups. They claim that "the single immutable principle in all of this Court's decisions from Hutcheson to H.A. Artists is that 'labor unions acting in their self-interest and not in combination with labor groups enjoy a statutory exemption from Sherman Act liability.'" (Petition citing H.A. Artists 451 U.S. at 714.) The focus of their argument is that if the union's conduct is not in combination with a non-labor group then the statutory exemption applies, regardless of the anti-competitive effects or whether or not their action is in furtherance of a legitimate labor concern. H.A. Artists is a case that focuses only on the issue of whether or not the party in combination with the union was a "non-labor party". The Court in H.A. Artists

concluded that the theatrical agents were indeed labor parties and that therefore, the exemptions applied because the unions were not in combination with non-labor groups. H.A. Artists does not deal with the issue of whether or not the unions were acting on a question of legitimate labor concern.

Moreover, the Court in H.A. Artists, while recognizing the two-prong test in Hutcheson, did not address the "self-interest" prong other than to point out that the matter in discussion was "a labor dispute" and therefore satisfied the self-interest test. 451 U.S. at 715. The remainder of the Court's analysis focused only on the question of whether or not the union's combination was with a non-labor group. Thus, the application

of H.A. Artists to the critical questions raised by this case is unhelpful.

We suggest that while it is true that the unions in this case have not acted with non-labor parties as to the conspiracies alleged in Count II, the objectives of their conduct did not include the resolution of a "labor dispute" and therefore, could not be within the union's self-interest as required by the two-prong test in Hutcheson.

CONCLUSION

The Chamber respectfully suggests that the decision of the Third Circuit, finding the statutory and non-statutory exemptions to be unavailable to this type of union conduct, correctly accommodates the decisions of this Court. Because of the importance of the question to industry generally, the Chamber reluctantly suggests

that the Court may wish to grant the writ limited to Petitioner's Question No. 1, but in the form suggested by the Chamber and Altemose, even though they were the prevailing parties in the appellate court.

Because of the enormous costs and limited resources of contractors in the construction industry, the Court has had and will continue to have, very few opportunities to address these critical issues. The tension between the language of H. R. Artists and Connell concerning the prerequisite of a legitimate labor objective as the sine qua non to the availability of either the statutory or non-statutory exemptions may warrant explication by the court in the compelling setting of the instant case.

It has become evident from the proliferation of cases such as Connell,

Consolidated Express v. N.Y. Shipping Ass'n., 602 F.2d 494 (3rd Cir. 1979), Muko, Inc. v. Southwestern Pennsylvania BCTC, 670 F.2d 421 (3rd Cir. 1982), that the construction trade unions in America have established a pattern of attempting to exclude all non-union competition from their relevant market by exacting non-union subcontracting clauses in agreements with friendly union contractors and through restraint and coercion against stranger contractors, as in this case. Their efforts in achieving these agreements are directed towards creating a monopoly for the union contractors and eradicating competition from non-union contractors in an effort to assure that only union workers are

employed in these markets. At the present time, the lack of clear guidance by the Court for contractors and construction users confronted with these efforts make the resolution of such anti-competitive practices an expensive quagmire into which few can afford to tread.

For these reasons, we reluctantly suggest that Question No. 1 is ripe for review and presents this Court with an opportunity to clarify its position on the application of these exemptions to cases in which the unions, in combination with each other but acting on behalf of favored employers, are attempting to create monopolistic

enclaves that would exclude all non-union competition from the market.

Respectfully submitted,

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